

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
April 27, 2006 Session

**TIMOTHY WADE KEYT v. Nanci Suzanne KeyT**

**Appeal from the Chancery Court for Putnam County**  
**No. 02-174     Vernon Neal, Chancellor**

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**No. M2005-00447-COA-R3-CV - Filed on June 22, 2006**

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This appeal involves the financial aspects of the dissolution of a twelve-year marriage. The trial court granted Wife a divorce and awarded her custody of the parties' minor child, alimony *in futuro*, child support and an equitable division of the marital estate which included the appreciation in Husband's interest in the family-owned trucking corporation. On appeal, Husband claims that the trial court erred in (1) determining the value of the appreciation of his interest in the corporation; (2) classifying the appreciation of his interest in the corporation as marital property; (3) the type and amount of alimony awarded to Wife; and (4) the amount of child support awarded to Wife. Wife also claims that the trial court erred in the valuation of the appreciation of Husband's interest in the corporation and that she should have been awarded attorney's fees. As herein modified, the judgment of the trial court is affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed as Modified**

WILLIAM B. CAIN, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J., and JERRY SCOTT, SR. J., joined.

Michael W. Binkley, Nashville, Tennessee, for the appellant, Timothy Wade Keyt.

Rankin P. Bennett, Cookeville, Tennessee, for the appellee, Nanci Suzanne Keyt.

**OPINION**

Timothy ("Husband") and Nanci Keyt ("Wife") were married on December 16, 1988, with one minor child born from the marriage. Wife was the primary care-giver for the parties' child and she worked solely in that capacity since the child's birth in March 1990. The highest level of education completed by Wife was high school while Husband completed three years of college. However, Husband was employed by his family's trucking company, Service Transport, Inc., performing a wide range of jobs until it was sold in December 2002.

On May 30, 2002, Husband filed a Complaint for Divorce alleging irreconcilable differences and inappropriate marital conduct. Husband sought the award of his interest in Service Transport, Inc. and joint custody of the parties' minor child. Wife filed an answer and counter-complaint for divorce on April 4, 2003, also alleging irreconcilable differences and inappropriate marital conduct. Wife sought an equitable division of the marital estate which she alleged included the appreciation of Husband's interest in Service Transport, Inc. and that she be named primary residential parent. Husband amended his Complaint on May 30, 2003, and requested that he be declared primary residential parent.

The court granted Wife a divorce on January 14, 2005, based on inappropriate marital conduct and declared her primary residential parent. Based upon Husband's gross monthly income of \$14,423.00, the court awarded Wife \$1,800.00 in child support, which was a downward deviation from the child support guidelines due to Husband's decision to exercise extra visitation. The court also awarded Wife alimony *in futuro* in the amount of \$1,500.00 per month for the first year of divorce and \$2,500.00 per month thereafter. In making a division of the marital property, the court determined that the increase in the value of Husband's interest in Service Transport, Inc. during the course of the marriage was marital property. The trial court valued the total marital estate at \$2,221,820.00 and awarded Wife 37.5 percent.

On appeal, Husband contends that the trial court erred in determining (1) the value of the appreciation of his Service Transport, Inc. stock; (2) that Husband's Service Transport, Inc. stock was marital property; (3) that Wife was entitled to alimony *in futuro* and the amount of the award; and (4) the amount of the child support award. Wife asserts on appeal that the trial court erred in (1) determining the amount of consideration Husband received from the sale of Service Transport, Inc.; and (2) denying Wife's request for attorney's fees. We review this non-jury case *de novo* upon the record with a presumption of correctness afforded to the trial court's factual findings unless the evidence preponderates otherwise. *Mitts v. Mitts*, 39 S.W.3d 142, 144 (Tenn.Ct.App.2000). "The trial court's conclusions of law are not accorded the same deference." *Mitts*, 39 S.W.3d at 144.

#### I. Valuation of Service Transport, Inc. Stock

Both parties contend on appeal that the trial court erred in its valuation of the appreciation of Husband's Service Transport, Inc. stock. However, some factual background is necessary before we can confront the issues raised by the parties. In 1984, Husband's father began gifting shares of Service Transport, Inc. to Husband, while retaining the voting rights as well as the ability to sell, transfer, or encumber the stock. Husband's Tennessee gift tax returns were admitted into evidence and Husband stated in Wife's request for admission that he believed the information in the returns to be correct. The returns established that the value of the stock at the time the gifts were made was \$253,229.00. Although the court ultimately determined that Husband was bound by this admission, Husband was allowed to enter additional proof regarding the value of the stock.

Husband's certified public accountant testified that the values stated in the returns were drastically deflated since the IRS allows deep discounts in the value of stocks containing restrictions

rendering them unmarketable, such as those imposed on Husband's Service Transport, Inc. stock. However, the restrictions on the stock were removed when Service Transport, Inc. was sold in December 2002. Husband claims that he should not be bound by his admission that he believed the information in the returns to be correct because although the values contained in the returns were correct for gift and inheritance tax purposes, the returns undervalued the actual value of the stock.

A trial court's decision regarding the value of a marital asset is entitled to great weight on appeal and will not be second-guessed unless it is not supported by the evidence. *Watters v. Watters*, 959 S.W.2d at 589; *Smith v. Smith*, 912 S.W.2d 155, 157 (Tenn.Ct.App.1995). When the valuation evidence is conflicting, making an explicit valuation finding provides helpful insight into the trial court's reasoning, materially enhances the parties' understanding of the trial court's decision, and helps focus the issues on appeal. *See Murray Ohio Mfg. Co. v. Vines*, 498 S.W.2d 897, 901-02 (Tenn.1973). Appellate courts are more likely to be able to conclude that a particular valuation decision is supported by the preponderance of the evidence when they have some insight into how the trial court made its decision.

*Robertson v. Robertson*, No. M1999-02103-COA-R3-CV, 2001 WL 459100, at \*4 (Tenn.Ct.App. May 2, 2001).

Despite the testimony from Husband's certified public accountant, the court found that Husband was bound by his admission that the value of the stock at the time of the gifts was \$253,299.00. Therefore, when the court determined the appreciation in the value of the stock, it subtracted the value of the restricted stock, \$253,299.00, from the proceeds Husband received from the sale of the corporation, \$1,283,367.86. Tennessee Rule of Civil Procedure 36.02 applies to the effect of admissions and states that "[a]ny matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." Furthermore, an admission under Rule 36 "concludes the matter and avoids any need for proof at trial." *Tenn. Dep't of Human Servs. v. Barbee*, 714 S.W.2d 263, 266 (Tenn.1986). "Thus, no proof is necessary to establish a fact admitted, nor should evidence be allowed to refute the admission." *Neely v. Velsicol Chem. Corp.*, 906 S.W.2d 915, 917 (Tenn.Ct.App.1995). We therefore find that the trial court was well within its discretion to determine that Husband was bound by his admission that the value of the stock at the time of the gift was \$253,299.00.

Wife also asserts on appeal that the trial court erred in the valuation of Husband's Service Transport, Inc. stock. Wife argues that in response to her motion to compel, Husband supplied a letter from his certified public accountant which stated that he received \$2,563,200.00 when he sold his Service Transport, Inc. stock. However, at trial Husband introduced a schedule listing deductions which reduced Husband's cash proceeds from the sale to \$1,283,367.86. Wife contends that it was error for the court to consider this additional evidence because she did not recall receiving the

schedule in discovery and because Husband should be bound by his prior statement that he received \$2,563,200.00 from the sale of the stock.

It was disputed at trial whether Wife received the schedule which showed how the monies from the sale of Service Transport, Inc. were disbursed and any deductions which were taken. Husband's certified public account testified:

Mr. Bennett: One of the things that you sent me was a copy of a letter from...I will ask you if this is a copy of the letter that you sent to me from Mr. Reynolds, the Nashville attorney, and Mr. Keyt about the stock sale?

A: I don't know whether I sent it to you or not. I have seen the letter.

...

Mr. Bennett: In that letter, do you agree with the contents of the letter where they show the sale proceeds from it?

A: May I see it please?

Mr. Clift: For the record, Your Honor, we gave him every document and supplied the pretrial brief yesterday.

A: What is your question, sir?

Mr. Bennett: Do you agree with the contents of that letter, the part that says what Mr. Keyt received for the stock?

A: The gross amount I do.

Q: Mr. Reynolds says that Mr. Keyt received \$2,563,000.000 cash, and \$256,000.00 was put in the escrow account.

A: It also doesn't reflect that there has to be expenses that has [sic] to be paid out of it that Service Transport owed. I believe the contract speaks to that.

Q: Well, that is what the 1.8 million dollar escrow account was to take care of. Correct?

A: No sir. There is a substantial bank debt that Service Transport owed to LaSalle National Bank. I believe First Tennessee was owed some. I believe that Union Planters was owed some. If you look at the contract, it specifically says that. Also, I believe that I have provided you a schedule that showed how the cash was actually disbursed and what the debts paid off were, et cetera, and exactly what Tim got out of it. That was not prepared by me. That was prepared by somebody else.

Q: Didn't the contract say that the cash proceeds would be paid to the sellers by a wire transfer to the bank of their designation on January 2, 2003?

A: I believe that it would be paid to somebody, but out of that all the debts had to be paid. The contract specifically says that.

Q: Well, my question was, it would be about \$2,300,000.00 for the cash portion of the proceeds from the sale that would by [sic] into Mr. Key[t]'s bank by wire transfer. Do you know where that money went?

A: It didn't go to him.

Q: Where did it go?

A: Again, it all went into the account in Nashville that I believe was in the name of the law firm down there, Edwards, Jones & Reynolds. Okay? Out of that all the expenses were paid related to the sale, and all the debts were paid off. Okay? Then, Tim got a net cash figure just like everybody else did. If you will look at that sheet that I provided you that shows the disbursements, I can show you scripture and verse on it.

Q: Well, is that in the contract?

A: It is not part of the contract. There was a disbursement sheet that the lawyers put together that showed how the monies was [sic] disbursed.

Q: Maybe Mr. Cl[i]ft has that.

Mr. Clift: You have been supplied that.

Generally, the admissibility of evidence is within the sound discretion of the trial court. *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn.1992). The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of discretion. *Id.* A trial court abuses its discretion "only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.' " *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn.2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn.1999)).

*Mercer v. Vanderbilt Univ., Inc.*, 134 S.W.3d 121, 131 (Tenn.2004).

Because the parties were in disagreement as to whether Husband provided the schedule to Wife during discovery, we cannot say that the trial court's decision to admit the additional evidence was error. However, Wife further contends that Husband should be judicially estopped from taking

a position contrary to his sworn response to Wife's motion to compel. "Under the doctrine of judicial estoppel 'a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by this action.'" *Marcus v. Marcus*, 993 S.W.2d 596, 602 (Tenn.1999) (citing *Obion County v. McKinnis*, 364 S.W.2d 356, 357 (1962)).

Another feature of the law of judicial estoppel, emphasized by our cases, is the presence or absence of explanation of the previous statement made under oath.

While the appellate courts of Tennessee have, for more than 50 years, upheld and preserved the sanctity of an oath by the application of this principle, yet, in order to avoid injustice, the severity of the rule has been tempered by this exception, viz.: If the party sought to be estopped can show that his previous statement under oath was made inadvertently or through mistake-- "inconsiderately," as many of the cases say--he will not be precluded by his former statement. For cases where no explanation was made of the previous sworn statement, see *Hamilton v. Zimmerman* (1857) 5 Sneed, 39; *Cooley v. Steele* (1859) 2 Head, 605; *Nelson v. Claybrooke* (1880) 4 Lea, 687; *Chilton v. Scruggs* (1880) 5 Lea, 308; *McEwen v. Jenks* (1880) 6 Lea, 289. For cases where a satisfactory explanation was made, see *Smith v. Fowler* (1883) 12 Lea, 163; *Seay v. Ferguson* (1873) 1 Tenn. Ch. 287; *Allen v. Westbrook* (1886) 16 Lea, 251.

*Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 317-18 (Tenn.1924).

In this case, the testimony of Husband's certified public accountant provided a sufficient explanation of the difference in the amount of proceeds stated in the letter and the amount of proceeds stated in the schedule. Although Husband may have grossed \$2,563,200.00 from the sale of the stock, the evidence clearly established that his proceeds were significantly reduced once the outstanding debts of the corporation were paid. "[J]udicial estoppel is based upon bad faith, and a sworn statement must have been made knowingly, or with such a degree of negligence that the court will impute knowledge to the affiant." *Broyles v. Scottish Union & Nat'l Ins. Co.*, 64 S.W.2d 517, 519 (Tenn.Ct.App.1933). There was no evidence of bad faith in this case and therefore we agree with the trial court that here, the rule of judicial estoppel is inapplicable.

## II. Classification of Service Transport, Inc. Stock

Husband next contends that the trial court erred in classifying the appreciation of his interest in Service Transport, Inc. as marital property since he did not substantially contribute to the stock's preservation or appreciation. In Tennessee, inherited property is generally separate property and therefore not subject to equitable division upon divorce. Tenn.Code Ann. § 36-4-121(b)(2). However, "Tennessee Code Annotated section 36-4-121(b) provides that the income from and increase in value of separate property will be considered to be marital property subject to division if each party substantially contributed to the separate property's preservation and appreciation." *Wade v. Wade*, 897 S.W.2d 702, 714 (Tenn.Ct.App.1994). "To be considered substantial, a spouse's contribution to the preservation and appreciation of the property must be 'real and significant.'" *Mitts*, 39 S.W.3d at 145 (citing *Brown v. Brown*, 913 S.W.2d 163, 167 (Tenn.Ct.App.1994)). "Whether a spouse made substantial contributions to the preservation and appreciation of separate property is a question of fact." *Mitts*, 39 S.W.3d at 145.

In *Clement v. Clement*, No. W2003-02388-COA-R3-CV, 2004 WL 3396472, at \*10 (Tenn.Ct.App. Dec. 30, 2004), Wife challenged the trial court's failure to find that the appreciation of Husband's separate properties should be included in the parties' marital estate and equitably distributed with the parties' other marital assets. Husband argued on appeal that he had not contributed to the appreciation of his separate properties during the duration of the marriage and therefore the properties' appreciation retained its status as separate rather than marital property. *Clement*, 2004 WL 3396472, at \*10. In finding that the appreciation in the separate properties was marital property, the court reasoned:

Mr. Clement claimed, at trial, that he had done nothing to contribute to the appreciation of his separate properties during the duration of his marriage to Ms. Clement. He pointed out that the actual day-to-day management of his properties was delegated to other individuals. The upshot of these assertions is that, if Mr. Clement did nothing to contribute to the appreciation or preservation of these separate properties, then Ms. Clement cannot be credited with helping to make such appreciation or preservation possible through her contributions as a homemaker. It strains credulity for Mr. Clement to suggest that he had little or no role in the preservation or appreciation of his separate assets during his marriage to Ms. Clement. While it may be true that many of the day-to-day responsibilities of managing the properties were delegated to other individuals, the record shows that Ms. Clement's contributions as a homemaker freed Mr. Clement up to oversee his wide range of properties and investments unburdened by the day-to-day management of the home or many of the responsibilities involved in parenting their son Bowers. Mr. Clement himself acknowledged that much of the management of his separate properties was delegated to employees of Guaranty Loan, of which Mr. Clement was an owner. Furthermore, even while such employees may have done the bulk of the work, Mr. Clement did, at times, take an active role in managing the properties---for example, he rehabilitated about 160 apartment units owned by Guaranty; he participated in the firing of a farm manager of Parkin Farm; and he was consulted by

Guaranty's employee Randy Catt whenever the farmers who leased Parkin Farm desired to make improvements to the property. Whether he chose to manage his properties by delegating day-to-day responsibility to other individuals is not especially material to this analysis. What is important is that Mr. Clement was ultimately responsible for managing his own properties and Ms. Clement's work as a homemaker allowed him to do just that. Given the length of the marriage, Ms. Clement's substantial responsibilities as a homemaker, and the fact that several of these properties maintained their value, or appreciated in value, under the management of Mr. Clement or his agents, we conclude that the appreciation of several of Mr. Clement's separate properties during his marriage to Ms. Clement should be considered marital property.

*Clement*, 2004 WL 3396472, at \*11.

In this case, Husband began working for Service Transport, Inc. in 1979 at the age of twenty-three. The testimony at trial showed that Husband performed a wide range of jobs while employed by the corporation, essentially learning the business from the ground up. During his tenure at Service Transport, Inc., he was employed as a truck driver and as a mechanic; he helped open freight terminals in Kingsport and Knoxville; he worked in the general office doing freight billing and other office duties; he covered for the terminal manager when he was out sick; he worked in sales and in the break bulk center in Nashville; and he helped open a new salvage store. Husband testified that he “did a little bit of everything” and that he “did whatever needed to be done.”

However, Husband argues that his work at Service Transport, Inc. did not include real and significant contributions to the growth of the corporation since his employment was limited to remedial tasks which could be performed by the average employee. He bases his argument on his lack of involvement in the managerial or business planning decisions of the corporation such as choosing new routes, negotiating new acquisitions, making purchasing decisions, or working in accounts receivable. Without managerial or organizational decision-making authority, Husband claims that he could not have made any real and significant contributions to Service Transport, Inc.’s growth.

In *Clement*, the court recognized that a spouse need not be involved in the day-to-day management of a business in order to substantially contribute to its preservation or appreciation. 2004 WL 3396472, at \*11. Instead, the court found that overseeing the delegation of employees involved in the management of a business was a sufficient contribution to alter the status of the appreciation in non-marital property. *Clement*, 2004 WL 3396472, at \*11. In this case, we have the opposite proposition. Husband alleges that he was only vested with responsibility over day-to-day matters in the corporation and that he lacked any managerial or business-planning authority. We could locate no factually similar case in our jurisdiction, however, we found the instances in which



the court determined that a spouse's contributions were insufficient for the increase in value of the property to have become marital property instructive.

In *Sherrill v. Sherrill*, 831 S.W.2d 293, 294 (Tenn.Ct.App.1992), husband inherited shares of Krystal Company from his father, a co-founder of the Krystal Company. Husband served as an officer and employee of the company until he sold his shares in a leveraged buy-out of the company. *Sherrill*, 831 S.W.2d at 294. Wife appealed the divorce action arguing that the trial court erred in failing to find that the increase in value of the separately owned stock was marital property. *Sherrill*, 831 S.W.2d at 294. The Court of Appeals affirmed the trial court's classification citing the trial court's findings of fact:

The record is absolutely void of any proof that *either* party took any action whatsoever to aid in the increase in the value of the Krystal Company stock. The Wife testified that for the first seven or eight years of the marriage the Husband drank to such an excess that he did not even show up at his Krystal job most Mondays; there can certainly be no inference from Wife's testimony that Husband's performance at Krystal had any positive influence upon the increase in the Husband's Krystal Company stock. To the contrary, Wife's proof supported a finding that Husband's performance at Krystal very likely had a negative influence upon the increase of the Husband's Krystal Company stock.

*Sherrill*, 831 S.W.2d at 294.

In *Harrison v. Harrison*, 912 S.W.2d 124, 125 (Tenn.1995), husband and his brother inherited a 125 acre farm which had increased in value from \$7,000 at the time of the parties' marriage to \$1,361,750 at the time of their divorce. Our Supreme Court reversed the lower courts and held that because the sole cause of the increase in value in the land was the construction of an interstate, neither party substantially contributed to the preservation and appreciation of the property as required for the increase in value of the property to have become marital property. *Harrison*, 912 S.W.2d at 124-25.

Based on the existing case law in Tennessee, we believe that the trial court correctly found that the increase in Husband's Service Transport, Inc. stock was marital property. The record demonstrates that although Husband did not have management responsibilities similar to the husband in *Clement*, he was significantly more involved in the growth of the business than the husbands in *Sherrill* and *Harrison*. Opening terminals and a salvage store, doing freight billing and working in sales for Service Transport, Inc. are not such menial contributions so as to be considered insignificant to the growth of the business.

### III. Alimony

Husband also challenges the trial court's alimony *in futuro* award to Wife, claiming that Wife has the ability to be rehabilitated and that the trial court overestimated his ability to pay. The trial court exercises substantial discretion in determining whether to award spousal support as well as the amount and duration of the support if it is warranted. *Bratton v. Bratton*, 136 S.W.3d 595, 605 (Tenn.2004). Matters of alimony are reviewed under an abuse of discretion standard, *Bratton*, 136 S.W.3d at 605, therefore appellate courts generally do not disturb these decisions unless they are not supported by the record. *Bogan v. Bogan*, 60 S.W.3d 721, 733 (Tenn.2001). In determining whether to make an award of alimony, the type of alimony, and the amount thereof, the trial court must consider the factors set forth in Tennessee Code Annotated section 36-5-121(i):

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earning capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home because such party will be custodian of a minor child of the marriage;
- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

After reviewing the relevant factors provided in Tennessee Code Annotated section 36-5-121(i), we believe that the trial court erred in awarding Wife permanent alimony. Although the record reveals that Wife has only a high school education, it is undisputed that she acquired five years of sales experience prior to the birth of the parties' son. There was no evidence of mental infirmity presented by Wife and the existence of Wife's Hashimoto disease was not shown to preclude her from obtaining gainful employment. Wife secured a substantial portion of a sizeable marital estate in the divorce, and the parties' only child will reach the age of majority in 2008. We believe that an award of rehabilitative alimony of \$2,500 per month for eight (8) years is more appropriate under the circumstances and reflects the legislature's clear preference for temporary, rehabilitative alimony as opposed to long-term support where the disadvantaged spouse has the ability to acquire additional job skills, education, or training that will enable him or her to become self-sufficient.

However, we cannot conclude that the trial court erred in the amount of alimony awarded to Wife. Husband contends on appeal that when Service Transport, Inc. was sold, he lost his job and consequently, his income. He further claims that without a college degree or any special skills or qualifications, he does not have the ability to acquire a management position in a trucking company. However, Husband admitted in his statement of income and need that at the time of divorce, he was employed as the managing partner of Dartmoor Realty earning a monthly gross income of \$13,370.00. It is well established that the two factors which are considered most relevant in deciding the amount of alimony awarded in a proceeding are the economically disadvantaged spouse's need and the obligor spouse's ability to pay. *Robertson v. Robertson*, 76 S.W.3d 337, 342 (Tenn.2002). Since Husband's admitted monthly income is sufficient to meet his court-ordered alimony obligations and Wife clearly has the need for support until she can become self-sufficient, we affirm, as modified, the amount of the trial court's alimony award.

#### IV. Child Support

The final issue raised by Husband on appeal concerns the trial court's child support award. Husband claims that it was error for the trial court to use \$14,423.00 as Husband's monthly gross income in calculating the appropriate amount of child support because at the time of trial, the rental income which Husband received from a trucking terminal, approximately \$11,000.00, was being withheld pending the outcome of a litigation regarding the sale of Service Transport, Inc. Absent the trucking terminal rental income, Husband's monthly income was reduced to approximately \$2,000.00. However, the court found that the temporary deferment of Husband's \$11,000.00 monthly rental income due to the possibility that the amount of monies held in escrow would be insufficient to cover his potential liability in the Service Transport, Inc. litigation was not a sufficient ground for reducing the child support obligation since Husband had other means by which to fulfill his financial obligation. The court stated in its January 6, 2005 memorandum:

The Court announced from the bench on October 27, 2004, and found that the plaintiff had a gross income of \$14,423.00 and that the guideline support amount should be \$2,143.00 per month. However, taking into account the extra time that the father has with the child of the parties, it was and is found that it would be in the best interest of the parties and the child that the sum be reduced down to \$1,800.00 per month. It has been shown to the Court that the record reveals that Mr. Keyt's income from the rental of the trucking terminal is now on hold in the amount of \$11,000.00 per month pending the outcome of the litigation regarding the sale of Service Transport. Obviously, there is no way for the Court to know or predict the outcome of that litigation. However, the Court finds that the plaintiff's CPA feels that there is a reasonable probability that the funds now held in escrow will be sufficient to pay any potential liability. The Court finds that the deferment of the \$11,000.00 per month of his rental income should be applied to his potential liability is not a sufficient ground or reason for reducing the child support obligation as previously found. The record reveals that Mr. Keyt has the funds from which he could make the child support payment.

Child support decisions are reviewed under an abuse of discretion standard. *State ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn.Ct.App.2000). However, the trial court's discretion is limited by the strictures of the child support guidelines. *Berryhill v. Rhodes*, 21 S.W.3d 188, 193 (Tenn.2000). A discretionary decision will only be set aside "if it rests on an inadequate evidentiary foundation or if it is contrary to the governing law." *Kaatrude*, 21 S.W.3d at 248. In *Yates v. Yates*, No. 02A01-9706-CH-00122, 1997 WL 746377, at \*5 (Tenn.Ct.App. Dec. 4, 1997), Husband attempted to rebut the presumption afforded to the trial court's child support award by claiming that his gross income should not have included his annual bonus because he had not received a bonus in the year prior to the divorce. The evidence presented at trial showed that although Husband did not receive a bonus in the year prior to the divorce, he had consistently received bonuses for the three years prior to that time. *Yates*, 1997 WL 746311, at \*5. The appellate court affirmed the trial court's award reasoning that "[a]n obligor parent's efforts to decrease the amount of his or her expected income by claiming that he or she will not receive a bonus are addressed to the trial court's assessment of the parent's credibility." *Anderton v. Anderton*, 988 S.W.2d 675, 680 (Tenn.Ct.App.1998) (citing *Yates*, 1997 WL 746311, at \*5).

Similarly to the obligor spouse in *Yates*, Husband's attempt to decrease the amount of his expected income by claiming that a pending litigation was temporarily deferring his rental payments in case the monies held in escrow were insufficient to cover his potential liabilities was a credibility issue which the trial court was in the best position to determine. In making its determination, the court relied on the testimony of Husband's certified public accountant who surmised that the monies held in escrow would likely be more than enough to cover any potential liability imposed in the Service Transport, Inc. litigation and thus Husband's rental payments would resume. We therefore find that the trial court properly exercised its role as fact-finder in determining that Husband had the ability to pay the required amount of child support.

## V. Attorney's Fees

Finally, Wife asserts that the trial court erred in refusing to award her attorney's fees. Wife first claims that the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") applies to this proceeding since the case dealt with the custody of the parties' minor child. Wife reasons that because she was the prevailing party in the litigation, there is a presumption that she is entitled to her attorney's fees under the Act. The UCCJEA was enacted to prevent interstate competition and conflict in matters of child custody. Tenn.Code Ann. § 36-6-202. There is no language within the UCCJEA which can be construed to broaden the statutes' application to purely intrastate custody disputes nor is such an intent evidenced by the legislature. *See Seamans v. Seamans*, 37 S.W.3d 693, 696 (Ark.Ct.App.2001). Because it is undisputed that this proceeding involved a purely intrastate custody dispute, the trial court was correct in refusing to award attorney's fees under the UCCJEA.

Wife alternatively asserts that she is entitled to attorney's fees because otherwise she would be required to deplete the assets awarded to her in the division of the marital estate in order to satisfy the obligation. A trial court's decision whether or not to award attorney's fees is well within the discretion of the court and will not be disturbed on appeal absent an abuse of discretion. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 751 (Tenn.2002). Although a trial court may award a spouse attorney's fees in order to help defray legal expenses, *Fox v. Fox*, 657 S.W.2d 747, 749 (Tenn.1983), the award is only proper when the spouse seeking them lacks the funds to pay the obligation, *Houghland v. Houghland*, 844 S.W.2d 619, 623 (Tenn.Ct.App.1992), or would be required to deplete his or her own resources to pay the expenses. *Harwell v. Harwell*, 612 S.W.2d 182, 185 (Tenn.Ct.App.1980).

In this case, Wife admittedly secured a substantial award from the trial court in the division of the marital estate as well as alimony in the amount of \$2,500.00 per month. Therefore we cannot find that the trial court abused its discretion in refusing to award attorney's fees because the record clearly establishes that Wife has the means to pay the obligation without significantly depleting her award. The judgment of the trial court is affirmed in part and reversed in part. The costs of appeal are assessed equally between the parties.

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WILLIAM B. CAIN, JUDGE